Supreme Court, U.S.
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No. 95-1105

In The
Supreme Court of the United States

October Term, 1995

THE CINCINNATI REDS,

Petitioner,

v.

ROBERT R. BRIDEWELL, et. al.

Respondents.

On Petition For Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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33 pp

QUESTION PRESENTED

UNDER THE FAIR LABOR STANDARDS ACT, DOES EMPLOYMENT OF SOME WORKERS BY AN AMUSEMENT OR RECREATIONAL ESTABLISHMENT DURING ITS FIVE MONTH OFF SEASON COMPEL THE CONCLUSION THAT THE ESTABLISHMENT "OPERATES" MORE THAN SEVEN MONTHS IN ANY CALENDAR YEAR?

PARTIES

Petitioner:

The Cincinnati Reds

Respondents:

Robert R. Bridewell

Stanley McAlpin

Daisy S. Pearl

Melville F. Walker

Eddie C. Rogers

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INTRODUCTION

The Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case entered on October 12, 1995.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 68 F.3d 136 (6th Cir. 1995).

The opinion of the United District Court for the Southern District of Ohio has not been reported.

STATEMENT OF JURISDICTION

The Complaint was filed on March 26, 1993, in the United States District Court for the Southern District of Ohio alleging a failure to pay time-and-one-half for overtime work under the Fair Labor Standards Act ("FLSA" or "the Act"). Jurisdiction of the district court was based upon 29 U.S.C. § 216, 28 U.S.C. §§ 1331, 1337.

On May 25, 1993, Petitioner, the Cincinnati Reds ("the Reds"), filed a motion for summary judgment alleging it was exempt from the overtime provisions of the FLSA pursuant to the exemption for amusement or recreational establishments that operate fewer than seven months in any calendar year. 29 U.S.C. § 213(a)(3). District Court Judge Herman J. Weber referred the motion for summary judgment to Magistrate Judge Robert A. Steinberg for report and recommendation.

On January 6, 1994, Magistrate Judge Steinberg heard oral argument on the motion. On February 14, 1994, he issued his Report and Recommendation. In his recommendation, Magistrate Judge Steinberg granted the Reds' motion for summary judgment for the years of 1991, 1992, and 1993. However, he found material issues of fact precluded the granting of summary judgment for the year 1990, since the Reds season was extended by the team's participation in the 1990 World Series.

Both Petitioner and Respondents filed motions to review the Report and Recommendation with District Court Judge Weber. On March 24, 1994, District Judge Weber affirmed Magistrate Judge Steinberg's grant of summary judgment to the Reds for the years of 1991, 1992 an 1993, and he granted summary judgment to the Reds for the year 1990.

Respondents appealed to the United States Court of Appeals for the Sixth Circuit on April 22, 1994. On October 12, 1994, the Sixth Circuit issued its opinion reversing and remanding to the district court. The Sixth Circuit held that the Reds' employment of workers in the off season compelled the conclusion that it operates more than seven months in any calendar year and, therefore, cannot qualify for the amusement and recreational establishment exception to the FLSA. The Sixth Circuit did not cite any case law for its conclusion. No petition for rehearing was filed.

The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

§ 13(a)(3) of the Fair Labor Standards Act, as amended, 29 U.S.C. § 213(a)(3), provides in pertinent part:

> (a) The provisions of section 206 [relating to minimum wages] and section 207 [relating to mandatory overtime pay] of this title shall not apply with respect to --
>
> > (3) any employee employed by an establishment which is an amusement or recreational establishment . . . if (A) [the establishment] does not operate for more than seven months in any calendar year [.]

STATEMENT OF THE CASE

The Cincinnati Reds is a limited partnership organized under the laws of the State of Ohio which owns and operates a major league baseball franchise. The Reds conduct 81 regular season home games each year at Riverfront Stadium, owned by the City of Cincinnati. The Reds' regular season runs from early April through early or late October of each year depending on whether they qualify for post-season playoffs and/or the World Series.[1]

The Cincinnati Bengals, a professional football franchise, also leases Riverfront Stadium for its regular season home games. The Bengals generally play four to six games at Riverfront Stadium after the baseball season concludes, *i.e.*, they have four to six home games between mid-October and late December.

Pursuant to the Reds' lease with the City of Cincinnati, employees of the Reds operate and control the scoreboard and message boards during Cincinnati Bengals games; pursuant to contracts between the Reds and the Cincinnati Bengals, in the off season, employees of the Reds clean the stadium concourse and private boxes prior to the Bengals games that occur after the baseball season.

The Reds employ over 700 employees during the baseball season. In contrast, the Reds employ approximately 120 employees in the off season.

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[1]The Reds have qualified for post season play eight times in the last 25 years, including five appearances in the World Series. But for work stoppages, the Reds likely would have qualified two other times, in 1981 and 1994.

Respondents are employees of the Reds who perform cleaning, maintenance, and other related activities at Riverfront Stadium in connection with major league baseball games played in Cincinnati, Ohio.

Respondents work on a regular basis during the regular season, but the nature of the Reds' home game schedule (alternating stretches of six or more consecutive games followed by similar out of town road trips) requires that they intermittently work greater than 40 hours in certain work weeks during the Reds homestands. It is for these weeks that the Respondents seek compensation at the rate of time and one-half under the Act.

REASONS WHY THE PETITION SHOULD BE GRANTED

I. CONTRARY TO THE REASONING OF THE SIXTH CIRCUIT COURT OF APPEALS, THE EMPLOYMENT OF SOME WORKERS BY AN AMUSEMENT OR RECREATIONAL ESTABLISHMENT DURING ITS FIVE MONTH OFF SEASON DOES NOT COMPEL THE CONCLUSION UNDER THE ACT THAT THE ESTABLISHMENT "OPERATES" MORE THAN SEVEN MONTHS IN ANY CALENDAR YEAR.

A. By virtue of the Sixth Circuit's Decision, there is now a direct conflict among the Circuit Courts of Appeals on the question of whether the employment of some workers during the off season by an amusement or recreational establishment compels the conclusion that it "operates" during the off season for purposes of the FLSA.

In September of 1995, the Eleventh Circuit Court of Appeals decided a case remarkably similar to the case at bar. Jeffery v. Sarasota White Sox, 64 F.3d 590 (11th Cir. 1995). In Sarasota White Sox, a groundskeeper for the Sarasota White Sox (a farm team of the Chicago White Sox) brought an action alleging the Sarasota White Sox failed to pay him time and one-half for overtime, pursuant to the FLSA. Sarasota White Sox, 64 F.3d at 592.

In this case, a group of maintenance workers for the Reds also brought an action alleging a failure to pay them time and one-half for overtime pursuant to the FLSA.

Bridewell v. The Cincinnati Reds, 68 F.3d 136, 137 (6th Cir. 1995). Both the Reds and the Sarasota White Sox rent the stadium where regular season games are played from the city in which the stadium is located. Sarasota White Sox, 64 F.3d at 593; Cincinnati Reds, 68 F.3d at 137.

Importantly, the District Court Order in Sarasota White Sox addressed the issue of off season employees and how they affect the seven month requirement for exemption. Sarasota White Sox, 64 F.3d at 596. This issue was raised in Sarasota White Sox because the employee in question in fact worked for the Sarasota White Sox during the off season. Id. The court specifically held that

> [t]he fact that Plaintiff was employed in the off season months relative to the preparation and maintenance of the baseball field does not alter the Court's finding that Defendant's operation does not last longer than seven months in any calendar year.

Id. The court went on to note that the exemption focuses on the length of the seasonal operation not on the length of time the plaintiff performed his work. Id. The court concluded its opinion by remarking that

> [i]t is the revenue-producing operation of the Sarasota White Sox as a professional baseball franchise which affords it the protection of the exemption. **29 U.S.C. §213(a)(3) does not require Defendant to completely shut down or to terminate every employee at the end of each baseball season.**

Id. (emphasis added) (internal citations omitted).

In each case, the baseball teams filed motions for summary judgment asserting they were exempt from the overtime provisions of the FLSA pursuant to the exemption for amusement or recreational establishments. Jeffery v. Sarasota White Sox, Inc., No. 93-1847-Civ-T-24(C) at 1 (M.D. Fla. Nov. 10, 1994); Bridewell v. The Cincinnati Reds, No. C-1-93-203 at 1 (S.D. Ohio Mar. 24, 1994). In both cases, the federal district courts held that the teams were exempt from the overtime provisions of the Act pursuant to the exemption for amusement or recreational establishments that operate for fewer than seven months in any calendar year. Sarasota White Sox, No. 93-1847-Civ-T-24(C) at 11; Cincinnati Reds, No. C-1-93-203 at 4.

Both cases were subsequently appealed to the appropriate Circuit Court of Appeals. Jeffery v. Sarasota White Sox, 64 F.3d 590 (11th Cir. 1995); Bridewell v. The Cincinnati Reds, 68 F.3d 136 (6th Cir. 1995). The Eleventh Circuit affirmed the district court's decision in Sarasota White Sox, *per curiam*, and incorporated the District Court Order into its opinion. Sarasota White Sox, 64 F.3d at 592. However, the Sixth Circuit reversed and remanded the district court's decision in Cincinnati Reds holding that the Reds do not qualify for the amusement or recreational exemption because the team employs up to 120 employees in the off season. Cincinnati Reds, 68 F.3d at 139.

The Sixth Circuit's holding in Cincinnati Reds directly contradicts the Eleventh Circuit's decision in Sarasota White Sox. This Court should grant certiorari to resolve the conflict among the Circuit Courts of Appeals with regard to whether the employment of some workers in the off season

by an amusement or recreational establishment compels the conclusion that the establishment "operates" during the off season and is, therefore, ineligible for exemption from the overtime provisions of the FLSA.

B. In FLSA jurisprudence, there are no other cases or administrative opinions that deny the amusement or recreational establishment exemption solely on the basis that the establishment has off season employees.

The Sixth Circuit's decision is at odds with well established interpretations of the Act. Courts and the United States Department of Labor's Wage and Hour Administrator have consistently recognized that a seasonal employer need not completely shut down operations after seven months in order to qualify for the exemption.

In Wirtz v. Freehold Racing Assn., 17 Wage & Hour Cas. (BNA) 308 (D. N.J. Feb. 15, 1966), the court held that the fact that the racing association maintained a few employees during the off season for public relations and outside maintenance did not mean that the establishment operated more than seven months of the year. Id. at 309, 311. The court explained that

> [t]he Defendant's only major operation is the conduct of its two-month race meeting. The importance of its off season operation is minimal. The Fair Labor Standards Act by its own terms applies to large businesses, yet it exempts certain seasonal businesses despite their magnitude. It is inconceivable that Congress intended that a $3 million business should close down *completely* during its non-

> income-producing months. Reasonable business practice makes such abandonment impracticable.

Id. at 311 (emphasis in original).

In an Opinion Letter by the Wage-Hour Administrator concerning whether a city beach that maintained some off season employees qualified for the amusement or recreational establishment exemption, the Administrator decided that

> [t]he fact that some of the lifeguards work more than seven months in the year maintaining the equipment would not serve to deny the exemption under section 13(a)(3), provided the *establishment* (the beach) is not open as a recreational facility (i.e., protected swimming) for more than seven months in any calendar year.

Wage and Hour Opinion Letter No. 1361, Lab. L. Rep. (CCH) ¶ 30, 974 (January 24, 1975) [June, 1973-September, 1978 Transfer Binder] (emphasis in original). Due to experience and informed judgment of the Agency charged with interpreting the Act, opinions of the Wage-Hour Administrator (while not binding on a court) are considered persuasive. See Brock v. Louvers and Dampers, Inc., 817 F.2d 1255, 1258 (6th Cir. 1987) and Hodgson v. Six Flags Over Georgia, Ltd., 20 Wage & Hour Cas. 843, 845-46 (N.D. Ga. Aug. 8, 1972), *aff'd*, Brennan v. Six Flags Over Georgia, Ltd., 474 F.2d 18 (5th Cir. 1973), *cert. denied*, 414 U.S. 827, 94 S.Ct. 47, 38 L.Ed.2d 61 (1973).

As explained in part A, *supra*, the Eleventh Circuit in Sarasota White Sox expressly rejected the argument that employment of some employees in an establishment's off season precluded the establishment from qualifying for the exemption. See also Hodgson v. Yellowstone Park Lines, Inc., 21 Wage & Hour Cas. (BNA) 32, 35 (D. Wyo. May 22, 1972), *rev'd on other grounds*, Brennan v. Yellowstone Park Lines, Inc., 478 F.2d 285, 287 (10th Cir. 1973), *cert. denied*, 414 U.S. 909, 94 S.Ct. 228, 38 L.Ed.2d 147 (1973) (the court held that Yellowstone Park Lines met the seasonal test exemption set forth in section 13(a)(3)(A) of the Fair Labor Standards Act even though Yellowstone employed approximately 50 employees in the off season in contrast to over 2,000 employees employed during the park's regular season; on appeal, the Tenth Circuit remarked in a footnote that it was "undisputed that defendants meet the seasonal requirements of § 213(a)(3).")

The Petitioner invites this Court to consider the holdings of the courts below and determine whether the employment of some workers in the off season by an amusement or recreational establishment compels the conclusion that the organization "operates" for more than seven months in any calendar year as that term is used in the Act.

C. The decision of the Sixth Circuit directly contradicts Congressional intent and the purpose of the FLSA exemption.

The Congressional intent underlying the exemption for amusement establishments was to relieve operators of

amusement parks, sporting events, and other seasonal establishments from the overtime and minimum wage provisions of the FLSA. An oft-quoted passage from the Sixth Circuit reads as follows:

> The purpose of the seasonal, amusement or recreational establishment exemption was not clearly spelled out in the legislative history of either the 1961 or 1966 amendments. However, there is some useful legislative history discussing a proposed 1965 amendment to the FLSA. The House Committee Report stated that the amusement and recreational establishment exemption would cover "such seasonal recreational or amusement activities as **amusement parks**, carnivals, circuses, **sporting events**, parimutuel racing, sport boating or fishing, or other similar or related activities . . . ." H.R. Rep. No. 871, 89th Cong., 1st Sess. 35 (1965). Although the proposed amendment was not passed, the legislative history is relevant because the following year Congress enacted a similar amendment including the amusement and recreational exemption. *See* Brennan v. Texas City Dike & Marina, Inc., 492 F.2d 1115, 1118 n.8, 21 WH Cases 740 (5th Cir.), cert. denied, 419 U.S. 896, 21 WH Cases 1061 (1974).

Brock v. Louvers and Dampers, Inc., 817 F.2d 1255, 1258 (6th Cir. 1987) (emphasis added).

The Sixth Circuit in Brock, went on to explain that the

> logical purpose of the provision is to exempt the type of amusement and recreational enterprises listed above, which by their nature, have very sharp peak and slack seasons. These businesses argue that they should not be held to the same wage and hour requirements as permanent, year-round operations. Their particular character may require longer hours in a shorter season, their economic status may make higher wages impractical, or they may offer non-monetary rewards. Congress responded to these concerns by enacting the amusement and recreational exemption.

Id. at 1259. The court also noted that the "crucial question for the purpose of determining whether or not a business falls within the exemption is whether or not it is truly seasonal [.]" Id.

In addition, two courts have recognized that, when Congress removed the amusement and recreational exemption from the retail and service exemption in 1966, Congress intended "to make plain that employees of seasonal amusement or recreational companies generally are exempt." See Marshall v. New Hampshire Jockey Club, Inc., 562 F.2d 1323, 1329 (1st Cir. 1977) and Brock v. Louvers and Dampers, Inc., *supra*, at 1257 (*quoting* Marshall v. New Hampshire Jockey Club, Inc., 562 F.2d 1323, 1329, 23 WH Cases 507 (1st Cir. 1977)).

Congressional intent is further evidenced in the only federal regulation issued about the amusement or recreational establishment exemption. This regulation defines amusement or recreational establishments as those establishments "frequented by the public for its amusement or recreation and which are open for 7 months or less a year [.]" 29 C.F.R. § 779.385 (1995) (emphasis added). The fact that the word "open" was chosen demonstrates that the exemption applies to an operation with an "on" season and an "off" season, regardless of whether the employees of the establishment may work in more than seven of the twelve months of a calendar year. The baseball season is open for less than seven months a year.

As the district court noted in Wirtz, the FLSA by its terms covers large organizations but also exempts certain large organizations. Wirtz, 17 Wage & Hour Cas. at 311. Congress specifically excluded seasonal operations from the FLSA provisions, and the language of the exemption focuses on the business' operation, not the number of months in which it has employees. The Congressional intent, as recognized by the Sixth Circuit in Brock, was to exempt organizations with very sharp peak and slack seasons where the number of employees varies dramatically from the regular season to the off season. Brock, 817 F.2d at 1259.

In the United States today, there are 26 American-based major league baseball franchises, 30 National Football League teams, 26 National Basketball Association teams, 19 National Hockey League teams, and hundreds of minor league baseball, basketball and hockey teams, all of which operates an "on" season and an "off" season. Thus, the Cincinnati Reds decision of the Sixth Circuit could have far reaching implications and could hinder Congressional intent

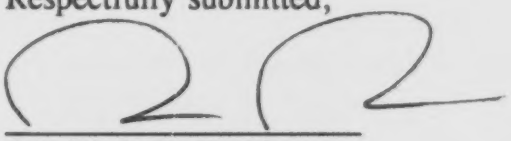
in the application of the FLSA not only in the Sixth Circuit but nationwide for sports teams; amusement parks (see Six Flags); race track operators (see Marshall v. New Hampshire Jockey Club); and other establishments that were specifically exempted from the FLSA.

The Sixth Circuit's decision would eliminate the well recognized exemption for amusement parks because many, like the Reds and other sporting event operators, employ employees in the off season. Such a holding would vitiate congressional intent regarding the exemption that was specifically designed to apply to operators of amusement parks and sporting events.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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APPENDIX

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1995 FED App. 0307P (6th Cir)
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No. 94-3562

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT R. BRIDEWELL; STANLEY MCALPIN; DAISY S. PEARL; MELVILLE F. WALKER; and EDDIE C. ROGERS,

Plaintiffs-Appellants,

v.

THE CINCINNATI REDS,

Defendant-Appellee.

ON APPEAL from United States District Court for the Southern District of Ohio

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Decided and Filed October 12, 1995

Before: NORRIS and DAUGHTREY, Circuit Judges; CHURCHILL, District Judge.[1]

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[1]The Honorable James P. Churchill, United States District Judge for the Eastern District of Michigan, sitting by designation.

ALAN E. NORRIS, Circuit Judge. This is an appeal from the district court's grant of summary judgment in favor of defendant, The Cincinnati Reds (the Reds). Maintenance employees of the Reds alleged that the team violated the Fair Labor Standards Act of 1938 (the Act), 29 U.S.C. §§201-219 (1988 & Supp. V 1993), by failing to pay a wage premium for overtime work. The district court granted summary judgment based upon the provision of the Act exempting amusement or recreational establishments that operate for fewer than eight months per year from its requirements. Because we believe that the district court erred in this determination, we reverse.

I.

The pertinent facts were stipulated by the parties. Plaintiffs are employees of the Reds who perform maintenance and cleaning duties at Cincinnati's Riverfront Stadium. The Reds operate a major league baseball franchise. They normally hold eighty-one regular season home games per year at Riverfront, which they lease from its owner, the City of Cincinnati. They open spring training camp in Florida in February each year, begin playing pre-season exhibition games there in March, and start their regular season at Riverfront in April. Reds' maintenance employees begin working at Riverfront in March to prepare the stadium for the regular season. The season generally ends in September, but can extend until October when the Reds qualify to participate in league playoff games.

The Reds' activities at Riverfront are not limited to playing baseball. Under their agreements with the City, the

team has the exclusive right to sell advertising on signs at Riverfront throughout the year, to operate the scoreboard during both their games and the games of the Cincinnati Bengals football club, and to contract with a concessionaire to operate at both Reds' and Bengals' games. Also, under contracts with the Bengals, the Reds are obligated to clean parts of the stadium when the Bengals play there. The Reds use their employees to perform all of these functions.

The number of people whom the Reds employ varies throughout the year. About 700 are employed during the peak of activity at Riverfront, roughly from April through September. The Reds employ approximately 120 people on a year-round basis.

Plaintiffs[2] sued in district court, alleging that the Reds violated the Act by failing to pay them a time and one-half wage premium for the hours they worked beyond forty hours per week as required by 29 U.S.C. §206. The Reds moved for summary judgment, arguing that they are exempt from the Act, since they qualify for the exemption provided by 29 U.S.C. §213(a)(3) for recreational and amusement establishments that do not operate for more than seven months in a calendar year. The district court granted

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[2]The five named plaintiffs sued on their own behalf and on behalf of their maintenance and cleaning co-workers who are members of the Service Employees International Union, Local 158-A, AFL-CIO, and who had worked more than 40 hours in a week during the three-year period preceding the filing of the complaint.

summary judgment in favor of the Reds on all of plaintiffs' claims.

II.

In reviewing a district court's grant of summary judgment, we proceed *de novo*. *EEOC v. Univ. of Detroit*, 904 F.2d 331, 334 (6th Cir. 1989). Summary judgment is proper if the pleadings, depositions, answers to interrogatories, admissions, and any affidavits "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Here, the question is whether, in view of the undisputed facts, the Reds qualify for the §213(a)(3) exemption. If so, they are entitled to judgment as a matter of law, and summary judgment is appropriate.

Section 213(a)(3) exempts from the Act's overtime pay provisions "any employee employed by an establishment which is an amusement or recreational establishment . . ., if (A) it does not operate for more than seven months in any calendar year." To qualify for the exemption then, the Reds (1) must be an amusement or recreational establishment and (2) must not operate for more than seven months in a calendar year. The Reds have the burden of establishing entitlement to the exemptions, which we construe narrowly. *Brock v. Louvers and Dampers, Inc.*, 817 F.2d 1255, 1256 (6th Cir. 1987). The Reds must show that they are "plainly and unmistakably within [the] terms and spirit" of the exemption. *Brennan v. Southern Productions, Inc.*, 513 F.2d 740, 744 (6th Cir. 1975) (citing *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960).

In view of the stipulated facts, it seems to us that the parties incorrectly focus on the duration of the Reds' activities at Riverfront rather than on the duration of the Reds' overall operation. An entity seeking to invoke the §213(a)(3) exemption must both be an amusement or recreational establishment and operate for fewer than eight months per year. The Reds would have us conflate these separate requirements and instead ask whether the Reds are an establishment that stages amusement activities for fewer than eight months per year. There is nothing in the Act that would suggest that this is the correct approach. The proper inquiry is, assuming *arguendo* that the Reds are an amusement or recreational establishment, whether the Reds operate for more than seven months per year, not whether they are an entity that provides amusement or recreation for its customers for more than seven months per year.

It is clear from the stipulated facts that the Reds do indeed operate for more than seven months per year. While a truly seasonal business that employs an insignificant number of workers year-round could conceivably qualify for the exemption, the fact that the Reds employ 120 year-round workers compels the conclusion that they "operate" year-round.

Because the Reds operate for more than seven months in a calendar year, they were not entitled to summary judgment based upon 20 U.S.C. §213(a)(3).

III.

For the foregoing reasons, we reverse the order of summary judgment in favor of the Reds and remand this cause to the district court for further proceedings.

FILED
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Mar 24 3:30 PM '94

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ROBERT R. BRIDEWELL, et al.,

Plaintiffs

v. C-1-93-203

THE CINCINNATI REDS,

Defendant

ORDER

This matter is before the Court upon the Report and Recommendation of the United States Magistrate Judge (doc. no. 29), defendant's motion for review (doc. no. 30), plaintiffs' memorandum in opposition (doc. no. 32), plaintiffs' motion for review (doc. nos. 31), and defendant's response (doc. no. 33).

Defendant's motion for summary judgment presents issues related to whether defendant The Cincinnati Reds qualify for the Amusement and Recreational Establishment exemption to the Fair Labor Standards Act (FLSA) overtime wage requirements.

The Magistrate Judge concluded that The Reds is an Amusement and Recreational Establishment within the meaning of an FLSA exemption, 29 U.S.C. §213(a)(3). The Magistrate Judge further determined that The Reds is entitled to summary judgment in their favor on plaintiffs' claims for the years 1991, 1992, and 1993, since The Reds did not operate more than seven months during those years. The Magistrate Judge determined that The Reds is not entitled to the exemption for 1990, since The Reds operated more than seven months that year.

Plaintiffs argue that The Reds is not protected by the exemption, because The Reds is not an "establishment" within the meaning of the Amusement and Recreational Establishment exemption. Plaintiffs rely on case law, Department of Labor regulations, and opinions of the Wage and Hour Administrator to define the term "establishment" as "a distinct place of business." According to plaintiffs, "the distinct physical place of business where plaintiffs are employed is Riverfront Stadium." (doc. no. 31, p. 3). Plaintiffs therefore argue that The Reds - admittedly a franchise in the business of amusement and recreation -- is not a distinct physical place of business.

Plaintiffs contend that The Reds will qualify for the exemption only if its operation at Riverfront Stadium "is so integral to Riverfront Stadium's operation that they constitute a single establishment." **Id.** at 4.

Upon a de novo review of the record, the Court finds that the Magistrate Judge has accurately set forth the controlling principles of law and properly applied them to the particular facts of this case. This Court therefore adopts the

Magistrate Judge's reasoning and conclusions, and finds that The Reds is an establishment within the meaning of the Amusement and Recreational Establishment exemption. The Magistrate Judge properly analyzed pertinent caselaw and opinions of the Wage and Hour Administrator. His analysis, moreover, is consistent with the intent of Congress as recognized by the United States Court of Appeals for the Sixth Circuit:

> The logical purpose of the provision is to exempt the type of amusement and recreational enterprises listed above, which by their nature, have very sharp peak and slack seasons.

Brock v. Louvers and Dampers, Inc., 817 F.2d 1255, 1258 (6th Cir. 1987). One of the amusement and recreational enterprises listed above by the Court is "sporting events." Id. at 1258. Each game played by The Reds at Riverfront Stadium therefore constitutes a sporting event. Accordingly, the Magistrate Judge correctly concluded that The Reds qualify for the Amusement and Recreational Establishment exemption for the years 1991, 1992, and 1993.

In light of the conclusion that each single game played by The Reds at Riverfront Stadium constitutes a sporting event which entitles The Reds to the exemption, this Court finds that the Magistrate Judge should not have considered pre-season games, played at Plant City, Florida, to calculate the amount of time The Reds operated during 1990. The Reds are entitled to the exemption for 1990 because each game they played at Riverfront Stadium constituted a single sporting event which Congress intended to exempt.

The Court rejects plaintiffs' reliance on the Department of Labor regulation which defines "establishment" as a "distinct physical place of business," 29 C.F.R. §779.23, since this limitation on the term is inconsistent with recognized Congressional intent. Agency interpretations remain "persuasive not precedential," **Brock**, at 1258, and need not be followed where there are compelling indications that an agency's interpretation is wrong." **Smith v. Babcock**, __F.3d ___, 1994 WL 76428 (6th Cir. March 14, 1994). The compelling circumstances in the instant case are found in the recognized intent of Congress to exempt sporting events and other similar amusement and recreational activities from the FLSA's overtime-wage requirements.

The Court finds that the parties' remaining contentions have either been adequately addressed and properly disposed of by the Magistrate Judge or present no particularized arguments that warrant specific responses by this Court.

ORDER

The Court **ADOPTS** in part and **MODIFIES** in part the Report and Recommendations of the United States Magistrate Judge (doc. no. 29), and **ORDERS** that:

(1) Defendant's motion for summary judgment (doc. no. 6) is **GRANTED**, and plaintiffs' claims are **DISMISSED** with prejudice;

(2) The parties' motions to review the Report and Recommendation (doc. nos. 30, 31) are **GRANTED** to the extent that the Court has considered the Report and Recommendation in light of the parties' objections.

The case is terminated on the docket of this Court.

IT IS SO ORDERED.

s/ Herman J. Weber
Herman J. Weber, Judge
United States District Court

No. 95-1105

Supreme Court, U.S.
FILED
FEB 12 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

THE CINCINNATI REDS,

Petitioner,

vs.

ROBERT BRIDEWELL, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the operator of a professional baseball team, which during its off-season employs approximately 120 employees and participates in the operation of a stadium staging professional football games, operate more than seven months in any calendar year for purposes of the amusement or recreational establishment exemption of the Fair Labor Standards Act?

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STATEMENT OF JURISDICTION

The Complaint was filed on March 26, 1993, in the United States District Court for the Southern District of Ohio alleging a failure to pay time-and-one-half for overtime work under the Fair Labor Standards Act ("FLSA" or "the Act"). Jurisdiction of the District Court was based upon 29 U.S.C. §216, 28 U.S.C. §§1331, 1337.

On May 25, 1993, Petitioner, the Cincinnati Reds ("the Reds"), filed a motion for summary judgment alleging it was exempt from the overtime provisions of the FLSA pursuant to an exemption for amusement or recreational establishments that do not operate more than seven months in any calendar year. 29 U.S.C. §213(a)(3). District Court Judge Herman J. Weber referred the motion for summary judgment to Magistrate Judge Robert A. Steinberg for report and recommendation.

On February 14, 1994, Magistrate Judge Steinberg issued a Report and Recommendation. In his recommendation, Magistrate Judge Steinberg granted the Reds' motion for summary judgment for the years of 1991, 1992, and 1993. However, he found material issues of fact precluded the granting of summary judgment for the year 1990, since the Reds season was extended by the team's participation in the 1990 World Series.

Both Petitioner and Respondents filed motions to review the Report and Recommendation with District Court Judge Weber. On March 24, 1994, District Judge Weber affirmed Magistrate Judge Steinberg's grant of summary judgment to the Reds for the years of 1991, 1992 and 1993, and he granted summary judgment to the Reds for the year 1990.

Respondents appealed to the United States Court of Appeals for the Sixth Circuit on April 22, 1994. On October 12, 1994, the Sixth Circuit issued its opinion reversing and remanding to the District Court. The Sixth Circuit held that the Reds did not qualify for the amusement and recreational establishment exemption to the FLSA because they operated more than seven months during the year. No petition for rehearing was filed.

Petitioner invoked the jurisdiction of this Court to review the judgment of the Sixth Circuit pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

Section 13(a)(3) of the Fair Labor Standards Act, as amended, 29 U.S.C. §213(a)(3), provides in pertinent part:

> (a) The provisions of section 206 [relating to minimum wages] and section 207 [relating to mandatory overtime pay] of this title shall not apply with respect to --
>
> > (3) any employee employed by an establishment which is an amusement or recreational establishment ...if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33 1/3 percentum of its average receipts for the other six months of such year ...

STATEMENT OF THE CASE

Respondents are cleaning and maintenance employees of Petitioner, the Cincinnati Reds. During the baseball season, Respondents work in excess of 40 hours during some weeks and are not paid overtime compensation.

The Reds operate a major league baseball franchise which conducts 81 regular season home games at Riverfront Stadium, which is owned by the City of Cincinnati. The Reds regular season begins in April of each year and ends in October.

The Cincinnati Bengals, a professional football franchise, also play their home games at Riverfront Stadium. The Bengals' season begins in August and extends to December or January. They play four to six games at Riverfront Stadium between mid-October and December.

The Reds operate the scoreboard and message boards during Bengal home games. They display advertising at Riverfront Stadium year round. They clean the stadium concourse prior to the Bengals' games which occur after the Reds season has ended, and they rent to the Bengals trash removal equipment for use after such games. They also clean private boxes in the stadium after such games. The Reds receive revenues for all of these services.

The Reds also contract for concessionaires to work both Bengals' and Reds' games. The Reds do not receive revenues for concessions sold at Bengals' games, but the Reds have granted Cincinnati Coca-Cola Bottling Company the exclusive right to sell soft drinks at both Reds' and Bengals' games in exchange for advertising rights on Reds' radio broadcasts, in baseball programs, and on signage at Riverfront Stadium.

The Reds employ over 700 employees during the baseball season and approximately 120 employees in the off-season.

REASONS WHY THE PETITION SHOULD BE DENIED

I. AN OPERATOR OF A PROFESSIONAL BASEBALL TEAM WHICH, DURING ITS OFF-SEASON EMPLOYS APPROXIMATELY 120 EMPLOYEES AND PARTICIPATES IN THE OPERATION OF A STADIUM STAGING PROFESSIONAL FOOTBALL GAMES, OPERATES FOR MORE THAN SEVEN MONTHS IN ANY CALENDAR YEAR FOR PURPOSES OF THE AMUSEMENT OR RECREATIONAL ESTABLISHMENT EXEMPTION OF THE FAIR LABOR STANDARDS ACT.

A. The Decision Of The Sixth Circuit Is Not In Conflict With Decisions Of Other Circuits

Petitioner argues that the decision of the Sixth Circuit in the instant case is in direct conflict with the Decision of the Eleventh Circuit Court of Appeals in Jeffery v. Sarasota White Sox, 64 F.3d 590 (11th Cir. 1995). The decisions, however, are not in conflict. Jeffery involved the Sarasota White Sox, a wholly owned subsidiary of the Chicago White Sox. The Sarasota White Sox had a lease to occupy and utilize a sports complex owned by the City of Sarasota, Florida. The Sarasota White Sox played minor league baseball games at the complex from April to August of each year. The Chicago White Sox held spring training in the complex in March of each year.

The Eleventh Circuit held that the Sarasota White Sox met the seasonality requirements of 29 U.S.C. §213(a)(3) for

two of the four years at issue in the case based upon the relative percentages of their receipts during six month periods in prior years. It held that the Sarasota White Sox qualified as a seasonal establishment for the other two years based upon the length of its operation during those years. In measuring the length of the Sarasota White Sox's operation of the Sarasota sports complex, the Eleventh Circuit specifically included the time period that the Chicago White Sox, a separate employer, held its spring training:

> The evidence shows that spring training in the sports complex in Sarasota begins and ends in March of each year. Defendant begins play in April and continues play up to the end of August each year. Accordingly, Defendant's operation at the baseball complex in Sarasota lasts approximately five months each year which is two months less than the seven month period afforded under 29 U.S.C. §213(a)(3).
>
> 64 F.3d at 596

The Jeffery decision also addressed the fact that Plaintiff in that case was employed beyond the seven month exemption period:

> The fact that Plaintiff was employed in the off-season months relative to the preparation and maintenance of the baseball fields does not alter the Court's finding that Defendant's operation does not last longer than seven months in any calendar year. The focus on the exemption is not on the length of time Plaintiff performed his work. Rather, the focus is on length of the Defendant's seasonal operation. It is the

> revenue producing operation of the Sarasota White Sox as a professional baseball franchise which affords it the protection of the exemption. 29 U.S.C. §213(a)(3) does not require Defendant to completely shut down or terminate every employee at the end of each baseball season.
>
> 64 F.3d at 596
> (Internal Citations Omitted)

Petitioner claims this language from the Jeffery decision is in conflict with the reasoning of the Sixth Circuit's decision in the instant case, which states in part:

> While a truly seasonal business that employs an insignificant number of workers year-round could conceivably qualify for the exemption, the fact that the Reds employ 120 year-round workers compels the conclusion that they "operate" year-round.
>
> 68 F.3d at 139
> (emphasis supplied)

Petitioner implies that the Sixth Circuit's decision holds that an employer that arguably is an amusement or recreational establishment operates longer than the seven month exemption period if it employs "some workers" in its off-season. As the introductory clause of the sentence quoted above makes clear, that is not the Sixth Circuit's holding. The Sixth Circuit's decision specifically contemplates the possibility that a seasonal employer might qualify for the exemption despite employing some employees during its off-season.

The Sarasota White Sox of the Jeffery case may be such an employer. The Jeffery decision contains little information about the activities of the Sarasota White Sox during their off-season, but the information it does contain suggests that those activities are limited. In three of the years at issue in Jeffery, the Sarasota White Sox earned $1,106, $2,614, and $323 in receipts during their off-seasons (compared with $476,339, $540,506, and $607,646 during their seasons). The decision also states that the Sarasota White Sox employed the Plaintiff, a groundscrew worker, during their off season, but does not state whether the White Sox employed any other workers during their off-season.

In contrast, the instant case contains substantial information about the activities of the Cincinnati Reds in their off-season, and those activities demonstrate that the Cincinnati Reds continue to operate during the off-season. The Reds employ approximately 120 employees during its off-season. They participate in the operation of Riverfront Stadium at Bengals' home games during November and December by cleaning the Stadium, renting the Bengals' cleaning equipment, operating the scoreboard and message boards, providing contracted for concessions, and exhibiting advertising.

While the Court's opinion places particular emphasis upon the number of workers employed during the Reds' off-season, its conclusion is not based upon that one particular fact:

> It is clear from the stipulated facts that the Reds do indeed operate for more than seven months per year.
>
> 68 F.3d at 139

The Sixth Circuit concluded that the Cincinnati Reds continued

to operate during their off-season. The stipulated facts of the case demonstrate that the Reds participate in the operation of Riverfront Stadium during their off-season for purposes of staging professional football games. The conclusion that the Reds continue to operate during their off-season through such activities is consistent with the Eleventh Circuit's conclusion that the Sarasota White Sox's operation of the Sarasota sports complex included the exhibition games played there by the Chicago White Sox.

The decisions of the Sixth Circuit in the instant case and the Eleventh Circuit in Jeffery are not in conflict. Neither decision holds that an amusement or recreational establishment operates more than seven months by employing some workers in its off-season. Both decisions find that an alleged amusement or recreational establishment's operation includes its participation in the operation of a sports stadium that is staging sporting events of another employer.

B. The Decision Of The Sixth Circuit Is Consistent With Established Precedent

Petitioner claims that the Sixth Circuit decision in the instant case is at odds with well established precedent interpreting the amusement or recreational establishment exemption. The cases cited by Petitioner in support of this proposition, however, do not hold that an employer can qualify for the existing amusement or recreational exemption while continuing to operate during its off-season to the extent that Petitioner does.

Wirtz v. Freehold Racing Assn., 17 Wage & Hour Cases 308 (BNA) (D.NJ. 1966) was decided under the Fair Labor Standards Act prior to the 1966 amendment creating the current

exemption for amusement and recreational establishments. Prior to that amendment, the FLSA contained an exemption for seasonal amusement and recreational establishments that was a constituent part of the exemption for retail establishments. The exemption required such an establishment to be a retail establishment and, in addition, to be an amusement or recreational establishment that operated on a "seasonal basis." It did not require the amusement or recreational establishment to meet objective tests of its receipts during a six month period to be less than 33% of its earnings in the other six months or not to operate for more than seven months, as required by the current exemption. Freehold Racing Association does not interpret the current exemption's requirement that an amusement or recreational establishment not operate more than seven months in any calendar year.

Wage and Hour Opinion Letter No. 1361, Lab. L. Rep. (CCH) ¶30,974 (January 24, 1975) [June, 1973-September, 1978 Transfer Binder], does apply the current exemption for amusement and recreational establishments, but does not allow such an establishment to operate for more than seven months. The opinion letter states that a city beach, which was open less than seven months per year, may qualify for the exemption, despite employing some life guards beyond seven months, maintaining equipment:

> [t]he fact that some of the life guards work more than seven months in the year maintaining the equipment would not serve to deny the exemption under section 13(a)(3) provided the establishment (the beach) is not open as a recreational facility (i.e., protected swimming) for more than seven months in any calendar year.

It is clear from this Opinion Letter that the beach was not open more than seven months per year, and there is no indication in the Opinion Letter that the beach operated in any other fashion beyond the seven month period. The holding that the beach was not disqualified from the exemption on the basis of employing some workers during its off season is not at odds with the Sixth Circuit's decision in the instant case.

Hodgson v. Yellowstone Park Lines, 21 Wage & Hour Cases (BNA) 32 (D.Wyo. 1972) rev'd, sub. nom. Brennan v. Yellowstone Park Lines, Inc., 478 F.2d 285 (10th Cir. 1973) cert. denied, 414 U.S. 909, 94 S.Ct. 228, 38 L.Ed.2d 147 (1973) involved two companies that operated hotels, inns, lodges, cabins, and restaurants in Yellowstone National Park. On appeal, the Tenth Circuit held that because of the geographical distance between the facilities, each facility was a separate establishment, and only those employees employed by one of the individual facilities were exempt from overtime compensation. Certain "central employees" (office, laundry, print shop, warehouse, garage, ice plant, fire watch, and maintenance and repair) who provided services to more than one of the facilities were held not covered by the exemption. 478 F.2d at 290.

The Tenth Circuit noted in a footnote that "It is undisputed that defendants meet the seasonal requirements of §213(a)(3)." 478 F.2d at 287, ftnt. 1. The District Court decision demonstrates why that issue was not disputed: each of the facilities opened on or after May 7 and closed on or before October 11. 21 Wage & Hour Cases (BNA) at 34. In addition, the District Court held that the companies' overall Yellowstone operation, which the District Court treated as a single establishment, met the receipts test of §213(a)(3)(B). Their receipts during the season were 98% of their total receipts. Id. Given this overall percentage of seasonal receipts, it is probable

that the individual facilities, which the Tenth Circuit found to be separate establishments, would also have met the receipts test.

Petitioner notes that Defendants in Yellowstone Park Lines employed approximately 50 workers during the off-season (as compared with over 2000 during the season). Nothing in either the District Court's or Circuit Court's decisions suggests that any off-season employees were employed by the individual facilities that the Tenth Circuit found to be separate establishments.

The cases Petitioner cites as being at odds with the decision of the Sixth Circuit all concern the employment of workers by an alleged amusement or recreational establishment during its off-season. None of those cases involved an establishment that continued to operate a business beyond the seven month exemption period. Those cases are not at odds with the decision of the Sixth Circuit in the instant case.

C. The Decision Of The Sixth Circuit Is Consistent With Congressional Intent In Amending The Exemption For Amusement Or Recreational Establishments

Prior to 1966, the Fair Labor Standards Act contained an exemption for certain retail or service establishments which included some amusement or recreational establishments. Section 213(a)(2) then provided as follows:

> (2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located, if such establishment --

(i) is not in an enterprise described in section 203(s) of this title, or

(ii) is in such an enterprise and is a hotel, motel, restaurant, or motion picture theater; or is an amusement or recreational establishment that operates on a seasonal basis, or

(iii) is in such an enterprise and is a hospital, or an institution which is primarily engaged in the care of the sick, the aged, the mentally ill or defective, residing on the premises of such institution, or a school for physically or mentally handicapped or gifted children, or

(iv) is in such an enterprise and has an annual dollar volume of sales (exclusive of excise taxes at the retail level which are separately stated) which is less than $250,000.

A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry;

29 U.S.C. §213(a)(2)
(pre 1966 amendment)
(emphasis supplied)

An amusement or recreational establishment could qualify for

this exemption by meeting the definition of a retail or service establishment, by being an enterprise engaged in commerce within the meaning of Section 203(s) of the Act, and by operating on a "seasonal basis". The 1966 amendment removed amusement and recreational establishments from the retail and service establishment exemption and preserved it as a separate exemption. It also replaced the general requirement of operating on a seasonal basis with the requirement of meeting one of two specific and objective tests. Under the post-1966 amended FLSA, an amusement or recreational establishment cannot qualify for an exemption unless:

> "(A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33 1/3 per centum of its average receipts for the other six months of such year..."
>
> 29 U.S.C. §213(a)(3)

It is well established that exemptions to the Fair Labor Standards Act are to be narrowly construed. Phillips, Inc. v. Walling, 324 U.S. 492, 65 S.Ct. 807, 89 L.Ed. 1095 (1945). The Sixth Circuit's decision narrowly construes Section 213(a)(3)(A) to literally require an amusement or recreational establishment not to operate more than seven months in any calendar year in order to qualify for the exemption.

Petitioner requests Section 213(a)(3) be interpreted to allow Petitioner to, among other things, perform functions relating to the staging of football games during its off-season and still qualify for the exemption. Such continued operation is inconsistent with a narrow construction of Section 213(a)(3), and conflicts with Congressional intent of establishing an

objective and definite tests to replace the requirement of operating on a seasonal basis.

Petitioner contends that the Sixth Circuit's decision would require an amusement or recreational establishment to close down its business and discontinue operations after seven months in order to qualify for the exemption. Such is not the case. An amusement or recreational establishment that chooses to operate after seven months can qualify for the exemption by meeting the receipts test of Section 213(a)(3)(B). An establishment that cannot meet that test because its "off-season" operations are too substantial is not truly seasonal and under the FLSA is not entitled to an exemption.

Finally, Petitioner contends that the decision of the Sixth Circuit would adversely affect the operations of numerous professional sports organizations. There is no evidence in the record of any professional sports organization other than Petitioner that refuses to pay overtime compensation to its maintenance and cleaning employees. There is no reason to believe any other professional sports organization denies such employees overtime compensation. The vast majority of such organizations would be ashamed to deny overtime compensation to ordinary workers who clean up the trash that fans leave behind, even as those organizations are throwing millions of dollars at star athletes and pocketing millions for themselves. Petitioner requests this Court to hold that the laws of the United States allow them to treat employees in that way. The Court should not do so.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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